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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KEVEN B., a Person Coming Under the Juvenile Court Law.	B229800 (Los Angeles County Super. Ct. No. TJ18965)
THE PEOPLE, Plaintiff and Respondent, v. KEVEN B., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Charles Scarlett, Judge. Affirmed.

Jonathan E. Demson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Keven B. appeals from the juvenile court's order declaring him a ward of the court after finding he committed second degree robbery and placing him home on probation. During the pendency of the appeal, the parties were unable to produce a viewable copy of a DVD of a security camera videotape that had been admitted into evidence and viewed by the juvenile court during the jurisdiction hearing. Keven contends that the People's failure to produce a viewable copy of the DVD deprives him of his constitutional rights to meaningful appellate review of his challenge to the sufficiency of the evidence and, alternatively, that the evidence is insufficient to establish that he aided and abetted the commission of the robbery. Keven further argues one of the conditions of his probation is overbroad. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Delinquency Petition*

The People filed a Welfare and Institutions Code section 602 petition alleging Keven, then 17 years old, committed one count of second degree robbery against Paul Gilbert on November 17, 2010. Keven, represented by appointed counsel, denied the allegation.

2. *The Jurisdiction Hearing*

Gilbert testified that in the early hours of November 17, 2010, he was outside a gas station convenience store, sitting in his wheelchair, making a call on his cell phone. Three male youths, including Keven, approached Gilbert and surrounded him.[1] Keven asked to see Gilbert's cell phone, while one of the other youths started searching through a bag attached to Gilbert's wheelchair. The third youth demanded that Gilbert surrender either his wheelchair or his cell phone. Gilbert gave up his wheelchair, because he believed the youths were gang members and feared what they would have done had he

1 Gilbert initially testified there were three or four youths, but later recalled there were only three of them.

refused to comply. Keven and the other two youths took the wheelchair and left the gas station together. Gilbert telephoned police.

The parties stipulated Gilbert had felony convictions for making a criminal threat in 2003 and for burglary in 2000 and in 2007. On cross examination, Gilbert admitted he had been under the influence of alcohol at the time of the robbery, having consumed three 16-ounce beers either one or two hours before leaving home for the gas station.

Los Angeles Police Detective Trevor Larsen investigated the robbery. He testified a gas station security camera videotaped (but did not audiotape) the November 17, 2010 robbery. Larsen obtained a DVD of the videotape, reviewed it prior to trial, and on direct examination described what it depicted.

According to Larsen, the DVD showed Gilbert sitting in his wheelchair outside the convenience store. Four youths, whom Larsen identified as Keven, Hill, Phillips, and a fourth male, who Larsen described as not associated with the case, walked towards Gilbert while conversing together.[2] They stopped just to the right of Gilbert and continued talking. Keven was standing just behind Gilbert's right shoulder, Phillips was standing nearly in front of Gilbert, and Hill positioned himself directly in front of Gilbert. Hill began arguing with Gilbert and searching through a bag attached to Gilbert's wheelchair.

At some point, all four youths walked out of camera range. Moments later, Keven, Hill and Phillips returned and surrounded Gilbert, who was still sitting in his wheelchair. Hill resumed arguing with Gilbert, who became visibly upset. After a time, Gilbert stood up, stepped out of his wheelchair, raised his hands and backed away. Keven walked around to stand in front of Gilbert as Philips moved to Gilbert's left and sat down in the wheelchair. Hill began pushing Phillips away in the wheelchair, and Keven walked with them out of camera range. The DVD ended with Gilbert talking on his cell phone outside the convenience store.

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2 Hill and Phillips are not parties to this appeal.

On cross-examination of Detective Larsen, defense counsel noted at one point the DVD showed that Keven: (1) initially walked toward the window of the convenience store, with his back toward Gilbert; (2) did not join in Hill's conversation with Gilbert; and (3) walked a few steps alone before Hill began pushing Phillips in the wheelchair. Counsel also noted the police report indicated Keven was alone when officers detained him, while Hill and Phillips were apprehended together and in possession of the wheelchair.

At the completion of the People's presentation of evidence, defense counsel made a motion to dismiss. (Welf. & Inst. Code § 701.1.) In support of her motion, counsel introduced into evidence part of the police report, a copy of the DVD of the security camera videotape and a photograph taken from the videotape.

After reviewing the DVD and hearing counsels' arguments, the juvenile court denied the motion to dismiss. The defense then rested, without Keven testifying or presenting additional evidence in his defense.

Following argument by counsel, the juvenile court determined the evidence established beyond a reasonable doubt that Keven had aided and abetted the commission of second degree robbery and sustained the petition.

3. *The Disposition Hearing*

The juvenile court declared Keven a ward of the court, and ordered him home on probation. Keven was also ordered, among other probation conditions, to attend a school program approved by the probation officer and to enroll in college. Keven timely appealed.

4. *The Settled Statement*

During the pendency of this appeal, we granted Keven's motion to augment the record with a copy of the DVD of the security camera videotape and ordered the District Attorney's Office to submit to the superior court a viewable copy of the DVD, to be forwarded to this court. Thereafter, the District Attorney's Office advised the juvenile court that it had a copy of the DVD, but it was not viewable. Keven filed a motion in this

court for a settled statement concerning the DVD (see Cal. Rules of Court, rule 8.137), which we granted.

At the settled statement hearing, the trial prosecutor was not present because he was no longer employed by the District Attorney's Office. Over the People's objection, the juvenile court permitted defense counsel, who represented Keven at the jurisdiction hearing, to make a record of her memory of the DVD.

Defense counsel stated she recalled the DVD showed Keven arrived alone at the gas station, and walked past Gilbert to the convenience store window. Keven had his back to Gilbert, who was sitting in a wheelchair. While Keven was still turned away, Hill walked up with two other youths and engaged Gilbert in an animated argument. Keven then turned to face Hill and Gilbert, who were still arguing. Keven stood there, as the argument continued, before walking away. At that point, Phillips sat in the wheelchair, and Hill pushed him out of the gas station.

A settled statement, settling the record with respect to the DVD of the security videotape was prepared and filed, adopting defense counsel's statement of what the DVD depicted.

DISCUSSION

1. *The Absence of a Viewable DVD Did Not Prevent Meaningful Appellate Review of the Challenge to the Sufficiency of the Evidence*

A defendant in a criminal matter is entitled to an appellate record adequate to permit "'meaningful appellate review.'" (*People v. Seaton* (2001) 26 Cal.4th 598, 699.) There is no rule of appellate procedure, however, that mandates reversal per se for lost or destroyed trial exhibits; instead, "'[t]he record on appeal is inadequate . . . only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal.'" (*Seaton, supra*, 26 Cal.4th at p. 699; *People v. Coley* (1997) 52 Cal.App.4th 964, 969 [Criminal defendants are entitled to due process, not perfect process].) Lost or destroyed exhibits may be reconstructed in some instances. (*People v. Osband* (1996) 13 Cal.4th 622, 661-633.) The burden is on the defendant to show any claimed deficiency

from a missing or inadequately reconstructed exhibit is prejudicial, such that it prevents meaningful appellate review. (*Seaton, supra,* 26 Cal.4th at p. 663.) In cases where loss or destruction of evidence was held to prevent meaningful appellate review, no adequate substitute was available under the particular circumstances. (See e.g. *In re Roderick S.* (1981) 125 Cal.App.3d 48 [reversal required where reporter's transcript did not contain sufficient evidence of illegality of possessed knife, and the knife was not available for examination by appellate court].)

Here, it was undisputed the DVD of the security camera videotape could not be produced. Because it was not available, Keven properly sought a settled statement hearing, in which both parties were given the opportunity to participate. The purpose of the settled statement hearing was to prepare a record of the contents of the missing DVD shown at the jurisdiction hearing for purposes of appeal. (*People v. Anderson* (2006) 141 Cal.App.4th 430, 440 ["[T]he purpose of a settled statement is to provide the appellate court with a record of trial court proceedings for which there is no formal contemporary record, commonly because the court reporter's notes have been lost [citation] or because a court reporter was not present to record the proceedings. [Citation.] In other words, the settled statement is used for filling 'gaps in the [appellate] record.' [Citation.]".) At the conclusion of the hearing, the juvenile court adopted the defense view of the contents of the DVD in its settled statement. The relevant issue then is whether the settled statement permits meaningful appellate review of Keven's challenge to the sufficiency of the evidence.

We conclude the settled statement is an adequate substitute for the missing DVD in this case. (See *People v. Osband, supra,* 13 Cal.4th at p. 662 [adequacy of settled and reconstructed record is reviewed de novo].) First, the settled statement provides a sufficiently clear description of the relevant portions of the DVD for this court to consider it as part of the record. Second, the settled statement sets forth the defense view of what the DVD depicted—that Keven was merely present when the robbery occurred—as defense counsel repeatedly indicated in referring to portions of the security

videotape during her cross-examination of Detective Larsen and in her arguments to the juvenile court.

2. *Substantial Evidence Supports the Juvenile Court's Finding Keven Committed Robbery*

a. *Standard of Review*

"The same standard of appellate review is applicable in considering the sufficiency of the evidence in a juvenile proceeding as in reviewing the sufficiency of the evidence to support a criminal conviction." (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605; *In re Michael M.* (2001) 86 Cal.App.4th 718, 726.) In either case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

b. *There is Sufficient Evidence Keven Aided and Abetted the Robbery*

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will accomplished by means of force or fear." (Pen. Code, §211, *People v. Harris* (1994) 9 Cal.4th 407, 415), and requires the specific intent to permanently deprive the victim of his or her property (*In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007). A person aids and abets the commission of a robbery "when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (2) by act or advise aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561; see *People v. Perez* (2005) 35 Cal.4th 1219, 1225.) The elements of aiding and abetting may be determined from a variety of factors, including the presence at the scene of the crime, companionship, conduct before and after the offense, and flight. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5 (*Juan G.*).

For example, in *Juan G.*, this court held the juvenile court had reasonably inferred the minor knew of, and shared, the perpetrator's criminal intent and aided and abetted the commission of a robbery, rejecting the minor's claim he was "'simply an "innocent, passive and unwitting bystander'" during the robbery." (*Juan G., supra*, 112 Cal.App.4th at p. 5.) The victim had been approached by the minor and perpetrator together. (*Id.* at p. 3.) When the perpetrator demanded money from the victim at knifepoint, the minor was beside him. The victim was afraid of being stabbed by the perpetrator, but also felt threatened by the presence of the minor, who was standing one foot away. (*Ibid.*) Following the robbery, the perpetrator and the minor fled and were found and arrested together. (*Id.* at pp. 5-6.)

Keven contends there was insufficient evidence of his involvement in the robbery, arguing the juvenile court's finding he committed the offense "was based on the erroneous assumption that [his] presence at the gas station was sufficient evidence of his aiding and abetting the robbery."

Keven's contention amounts to no more than a request that we reweigh the evidence and substitute our judgment for that of the trier of fact, which is not the function of a reviewing court. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139, *People v. Culver* (1973) 10 Cal.3d 542, 548.) There was conflicting evidence as to whether Keven aided and abetted Hill and Phillips in committing the robbery. Gilbert's testimony that Keven demanded his cell phone when the youths approached and Hill began searching his bag was neither physically impossible nor inherently improbable in light of Keven's proximity to Gilbert during the incident. Even if we were to assume, based on Detective Larsen's testimony, Keven did not share Hill's criminal intent when he was conversing with Phillips and the fourth youth and Hill was confronting Gilbert, that changed once the fourth youth departed. Immediately thereafter, Keven, Phillips and Hill approached and surrounded Gilbert, and Hill demanded Gilbert's wheelchair or cell phone. When Gilbert relinquished his wheelchair, Keven placed himself in front of Gilbert as Phillips got into the wheelchair, and the three of them left the gas station. The evidence supports the finding that Keven committed second degree robbery as an aider and abettor. Unlike the minor in *Juan G.*, Keven did more than pose as a threatening presence during the robbery and flee with his companions following the robbery. Instead, Keven, Hill and Phillips engaged in coordinated acts of intimidation to coerce Gilbert to surrender his wheelchair.

3. *The Challenged Probation Condition Is Not Constitutionally Impermissible*

At the disposition hearing, the juvenile court required Keven, as a condition of probation, to attend a school program approved by the probation officer and to enroll in college as soon as possible. Keven was 17 years old at the time and had graduated from high school a year early. Prior to imposing this condition, the court was informed by Keven's mother that Keven was considering attending El Camino College, a community college.

Keven contends the probation condition is overbroad because it infringes upon his right to work rather than attend college. Notwithstanding the People's claim of forfeiture, we find do not find the probation condition to be overbroad.

The juvenile court is empowered to impose conditions of probation in juvenile cases and has wide discretion when formulating such conditions. A juvenile probationer may be therefore subject to "any and all reasonable conditions" the court "may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b); *In re Sheena K.* (2007) 40 Cal.4th 875, 889.) In deciding whether a probation condition is unconstitutionally overbroad, the test is whether it impinges on a constitutional right and is not carefully tailored and reasonably related to the compelling state interest of reformation and rehabilitation. (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1152-1153.)

The probation condition that Keven attend a probation-officer-approved school program and enroll in college is not unconstitutionally overbroad. The correlation between education and the rate of crime is well-known. (*In re Angel J.* (1992) 9 Cal.App.4th 1096, 1100.) Not surprisingly, "[s]chool attendance has regularly been upheld as a condition of probation reasonably related to rehabilitation and prevention of future criminality." (*In re Robert M.* (1985) 163 Cal.App.3d 812, 815). Requiring Keven to attend college is likely to increase the prospect of his receiving valuable education and/or training, obtaining gainful employment, achieving success in society and avoiding criminality. Nor does the probation condition impinge on Keven's right to work. The probation condition neither prohibits him from working while attending college, nor requires him to attend on a full-time basis that might preclude gainful employment. Indeed, a probation-officer-approved school program may well consist of both college classes and work.

However, because gaining admission to college may be beyond Keven's control, to uphold the condition, we interpret it to mean that if Keven applies to attend college and is not accepted due to circumstances not of his own making, he may not be found to be in violation of his probation.

DISPOSITION

The order is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.